

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
SOUTHERN DISTRICT

SUPERIOR COURT  
05-S-2396 to 2401

State of New Hampshire

v.

James B. Hobbs

**Opinion and Order**

Lynn, C.J.

The defendant, James B. Hobbs, is charged with one count of theft by misapplication of property and five counts of forgery. The defendant has moved for reconsideration of this court's order granting the motion of the Nashua Telegraph ("the Telegraph") to unseal the defendant's motion to appoint counsel and accompanying financial affidavit. The Telegraph objects. The court conducted a hearing on this motion on March 20, 2006. Upon due consideration of the parties' arguments and submissions, and the relevant law, the court finds and rules as follows.

**Background**

On December 20, 2005, the defendant was indicted on one count of theft by misapplication of property and five counts of forgery. Prior to his indictment, the defendant filed an *ex parte* motion to appoint counsel and to seal his financial affidavit. This court denied the defendant's motion as premature. Subsequently, the defendant moved for reconsideration of his *ex parte* motion, which the court also denied. On December 21, 2005, the defendant again filed a motion for the appointment of counsel based upon his previously filed financial affidavit. The court granted this motion.

On December 22, 2005, the Telegraph moved to unseal the defendant's motion for appointment of counsel and accompanying financial affidavit. This court granted the motion to unseal on January 11, 2006, relying on the New Hampshire Supreme Court's recent decision in Associated Press v. State of New Hampshire, \_\_\_ N.H. \_\_\_ (Dec. 30, 2005). The defendant's present motion for reconsideration followed. At some point following the court's January 11th order, the Telegraph published a story referencing information contained within the defendant's financial affidavit.

### Analysis

The defendant requests that the court order that all documents originally sealed in this matter be resealed and that no further dissemination of these documents, and any derivative documents, be permitted without court order. The defendant argues that Associated Press, as a civil case, differs from this case. Specifically, the defendant maintains that this case implicates his right to counsel and his right against self-incrimination under the State and Federal Constitutions. Further, the defendant asserts that public dissemination of the motion for appointment of counsel and his financial affidavit could prejudice his State and Federal Constitutional rights to a fair trial. The Telegraph responds that sealing these documents and imposing a "gag order" would be constitutionally impermissible. As support for its argument, the Telegraph asserts that there is a strong public interest in affording public access to information concerning programs that receive public funding, such as those that provide attorneys to indigent defendants.

For his part, the defendant also raises a constitutional claim. He submits that the only reason he faces potential violations of his constitutional rights is that he does not have the financial ability to retain private counsel. The defendant maintains that forcing him to risk

deprivation of his right to a fair trial in order to secure his right to counsel deprives him of his right to equal protection of the law.

In New Hampshire, “the press has been held to have a State constitutional right, though not unlimited, to gather news.” Keene Publ’g Corp. v. Cheshire County Super. Court, 119 N.H. 710, 711 (1979) (citing N.H. CONST. pt. I, art. 22) (other citations omitted). “To effectuate this right, [the New Hampshire Supreme Court] has adopted standards that govern pretrial criminal hearings and establish a presumption in favor of open judicial proceedings and unsealed court records.” Id.

Further, “part I, article 8 of the New Hampshire Constitution provides for the openness, accessibility, accountability and responsiveness of government.” Petition of Keene Sentinel, 136 N.H. 121, 127 (1992). “[P]art I, article 8 [also] specifically provides that in aid of the foregoing the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” Id. (quotation omitted). The supreme court noted that “[t]hese constitutional provisions make no explicit distinction between civil and criminal records, and none can reasonably be implied.” Id.

[U]nder the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstances, that is, a sufficiently compelling interest, which outweighs the public’s right of access to those records.

Id. at 128 (citations omitted).

With respect to criminal matters, the supreme court has acknowledged that there is a “constitutional right of access to criminal trials.” Associated Press, \_\_\_ N.H. at \_\_\_ (slip op. at 4) (quoting Globe Newspaper Co. v. Super. Court, 457 U.S. 596, 606 (1982)).

[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process--an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Id. at \_\_\_\_ (slip op. at 4-5) (quoting Globe Newspaper Co., supra). Accordingly, absent the defendant's showing of a sufficiently compelling interest for nondisclosure, the press and the public's constitutional right of access to court records prevails and the records currently at issue must remain unsealed. See id. at 130.

The court finds that the defendant has failed to meet his burden of demonstrating an interest which justifies nondisclosure in this case. While the specific issues regarding sealing a defendant's request for appointment of counsel and accompanying financial affidavit have not been addressed by the New Hampshire Supreme Court, the court has found that "financial affidavits filed in domestic relations cases are subject to the constitutional right of access." Associated Press, \_\_\_\_ N.H. at \_\_\_\_ (slip op. at 10). The supreme court articulated that "the State constitutional right of access attaches only to those documents that are important and relevant to a determination made by the court in its adjudicatory function in connection with a proceeding to which the State constitutional right of access has attached." Id.

Although Associated Press dealt with the right of access to financial affidavits in domestic relations cases, this court finds that there is a similar constitutional right of access to financial affidavits in criminal cases. Financial affidavits in criminal cases are utilized to determine whether the court should appoint counsel to represent a defendant in a criminal

proceeding. See RSA 604-A:2 (2001). Thus, the court finds that the defendant's motion for appointment of counsel and accompanying financial affidavit "are subject to the constitutional right of access because they are important and relevant to a determination made by the court in its adjudicatory function in connection with a presumptively open proceeding." Associated Press, \_\_\_ N.H. at \_\_\_ (slip op. at 10).

Nevertheless, the supreme court has acknowledged that there could be circumstances of disclosure which could impact an accused person's constitutional rights. Petition of Keene Sentinel, 136 N.H. at 130. When such an instance occurs, the trial court must address the concerns in a fashion which addresses the competing access issues but which does not render the access issues moot pending final resolution. Id. Moreover, while there is a presumptive right of access given to the press, this right is limited "by the necessity that it be balanced against a criminal defendant's fundamental right to a fair trial." Petition of WMUR Channel 9, 148 N.H. 644, 647 (2002) (citations omitted).

In the present case, the defendant asserts that public access to his motion and financial affidavit implicate his right to counsel, his right against self-incrimination and his right to a fair trial under the State and Federal Constitutions. Accordingly, the court will address whether continued disclosure of the defendant's request for appointment of counsel and accompanying financial affidavit would violate these constitutional rights.

The right to counsel in criminal matters is found in part 1, article 15 of the New Hampshire Constitution and in the Sixth Amendment of the United States Constitution. State v. Staples, 121 N.H. 959, 961 (1981). Further, RSA Chapter 604-A implements a program for appointment of counsel for indigent defendants who are charged with criminal offenses. Part 1, article 15 of the New Hampshire Constitution and the Fifth Amendment to the United

States Constitution also contain guaranties that no person shall be compelled to provide testimony against himself that may implicate him in the commission of a crime.

While the New Hampshire Supreme Court has not addressed the particular issues involved in this case, it has noted that it would be improper to condition enjoyment of one constitutional right upon a waiver of another constitutional right. Opinion of the Justices, 121 N.H. 531, 540 (1981).

To require a person to surrender one constitutional right in order to gain the benefit of another is simply intolerable. Not every government-imposed choice in the criminal process that discourages the exercise of constitutional rights, however, is prohibited. Nevertheless, there are some choices which the State cannot require a defendant to make, and a choice between constitutional rights is one of them.

State v. Hearns, 151 N.H. 226, 238 (2004) (quotations and citations omitted).

In this case, the State has not yet indicated whether it will seek to use information contained within the defendant's financial affidavit at trial. Thus, the court finds that the defendant's claim of a violation of his right against self-incrimination is speculative at this point in the proceedings. Instead, "[t]he time for protection will come when, if ever, the government attempts to use [such] information against the defendant at trial." United States v. Krzyske, 836 F.2d 1013, 1019 (6th Cir. 1988) (quotation and citation omitted).

It is sufficient for present purposes to note that, were the State to seek to use information from the defendant's financial affidavit, the proper remedy very likely would be to employ by analogy the type of exclusionary rule fashioned by the United States Supreme Court in Simmons v. United States, 390 U.S. 377 (1968). In Simmons, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Simmons, 390 U.S. at 394. Similarly, in this

case, the State probably would not be permitted to use, in its case-in-chief, any information provided by the defendant in order to obtain the appointment of counsel. “The defendant should enjoy his constitutional rights to counsel and to appeal and the means of supporting his assertion of these rights by [providing] his own [information] without running the risk that thereby he may be incriminating himself with respect to the charges pending against him.” United States v. Branker, 418 F.2d 378, 380 (2nd Cir. 1969).

Finally, the defendant argues that public dissemination of his motion for court appointed counsel and accompanying financial affidavit could prejudice his constitutional right to a fair trial by tainting the jury pool. “It is well established that due process requires that an accused must receive a trial by a fair and impartial jury.” State v. Laaman, 114 N.H. 794, 798 (1974) (citations omitted). “Publicity about a case can result in ... actual prejudice which exists when the publicity has infected the jurors to such an extent that the defendant cannot or has not received a fair and impartial jury trial.” Id. (citations omitted). “In this situation, the defendant must show that the nature of the opinions formed by the jurors as a result of the publicity are such that they cannot be set aside by the jurors to enable them to render a verdict based on the evidence presented in court.” Id. (citations omitted). “Whether or not the required impartiality of a juror has been affected by the publicity to such an extent that he or she cannot render a verdict based on the evidence presented in court is to be determined in the first instance by the trial court on voir dire.” State v. Stewart, 116 N.H. 585, 587 (1976) (citations omitted). “Voir dire examination serves to protect [the right to be tried by a fair and impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors.” State v. VandeBogart, 136 N.H. 107, 110 (1992) (quotation and citation omitted). Here, the court finds it highly unlikely that media exposure of any information contained in the defendant’s motion for appointment of counsel or

in his financial affidavit will negatively impact his ability to select a fair and impartial jury. Certainly the risk of such adverse impact has not been shown to be anywhere near significant enough to justify limiting press access to these documents. The court feels confident that it has sufficient other tools available to it (i.e., voir dire questioning of prospective jurors, a change of venue, etc.) at the time of jury selection that there is no need for the far more drastic action requested by the defendant.

### Conclusion

For the foregoing reasons, the court DENIES the defendant's request to reseal all documents originally sealed in this matter and to preclude further dissemination of these documents, and any derivative documents. The defendant has failed to demonstrate that the release of these documents has violated or will violate his right against self-incrimination or his right to a fair trial. Accordingly, the defendant has not met his burden of proving a sufficiently compelling interest which outweighs the public's right of access to the court records. Therefore, the defendant's motion for reconsideration is DENIED.

So ordered.

April 10, 2006

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Robert J. Lynn  
Chief Justice